

Title Suit No.1336/2018
CNR: WBSP02-003141-2018
J.O. (WB01066)

10.02.2023

Today is fixed for passing order in the matter of Order 7 Rule 11 of the Code of Civil Procedure filed by defendant No.2.

All the contesting parties filed their respective hazira.

Application for rejection of plaint, written objection, counter reply and the plaint with annexed documents, are perused.

In the instant application defendant No.2 prays for rejection of plaint on the ground that the plaintiff has no cause of action to bring the suit against the defendants. It is argued that prayer Nos. 'a' and 'd' are inconsistent to each other and no effective decree can be passed. It is argued that the plaintiff can not sail in two boats at the same time; one hand he claims partition of the suit property as co-sharer and on other hand, in case of failure to get partition, as an alternative prayer he is claiming to be a monthly tenant in 'A' schedule property. It is further argued that the plaintiff has no right, title and interest in 'A' schedule property. It is further argued that there is no specific description of the immovable property mentioned in 'B' schedule of the plaint, rendering it invalid under Order 7 Rule 3 of the Code of Civil Procedure. It is claimed by defendant No.2 that she purchased 'A' schedule property from its original owner by dint of a registered Deed of Conveyance, as such, the property is no longer a joint property and defendant No.2 is the absolute owner of the same. It is further argued that the Deed of Conveyance executed in favour of defendant No.2, is not challenged in the suit, which makes the suit frustrated. It is argued that in the unchallenged probated will executed by Anandi devi Goenka, the plaintiff is not a beneficiary in regards to the suit properties; and as such, he can not claim any right, title and interest over the same. It is further contended that the lease of 'A' schedule property had been surrendered to defendant No.2 being its owner but that surrender of lease has not been challenged in the

suit and no consequential relief is prayed for. It is further argued that though the plaintiff is claiming his right through Sawarmal Goenka HUF, but he does not make it as a party to the suit. It is also argued that the plaintiff is not in possession of the suit property, and as such, in absence of a consequential relief for recovery of possession, no effective decree can be passed.

In support of his contention, Learned Advocate for defendant No.2 cited the following judgements:

1) In *T. Arivandandam vs. T. V. Satyapal and Anr.* reported in (1977) 4 SCC 467 the Supreme Court was pleased to hold that *if on a meaningful reading of a plaint it is manifestly vexatious, and merit less, in the sense of not disclosing a clear right to sue, power under Order VII Rule 11, C.P.C. should be exercised. If claver drafting has created an illusion of a cause of action, nip it in the bud at the first hearing.*

2) In *Rajendra Bajoria and Ors. vs. Hemant Kumar Jalan and Ors.* reported in 2021 SCC OnLine SC 764 the Supreme Court was pleased to hold in para 20 that *under Order VII Rule 11 of CPC, the duty is cast upon the Court to determine whether the plaint discloses a cause of action, by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon or whether the suit is barred by law.*

3) In *Dahiben vs. Arvindbhai Kalyanji Bhanusali* reported in (2020) 7 SCC 366 the Supreme Court was pleased to hold that *the underlying object of Order 7 Rule 11(a) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(d), the Court would not permit the plaintiff to unnecessarily protect the proceedings of the suit. In such a case it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.*

4) On the point of need to seek consequential relief in a declaratory suit, defendant No.2 cited one judgement passed by the Supreme

Court in Union Of India vs. Ibrahim Uddin and Anr. reported in (2012) 8 SCC 148.

5) In Executive Officer, Arulmigu Chokkanatha Swamy Trust vs. Chandran and Ors. reported in (2017) 3 SCC 702 the Supreme Court was pleased to hold that the plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction, who ought to have claim further relief of recovery of possession. It was further held that the suit for a mere declaration filed by a dispossessed plaintiff without relief of recovery of possession is not maintainable.

6) In Roop Lal Sathi vs. Nachhattar Singh Gill reported in (1982) 3 SCC 487 the Supreme Court was pleased to hold that *where the plaint discloses no cause of action, it is obligatory upon the Court to reject the plaint as a whole under Order 7 Rule 11(a) of the Code, but the rule does not justify the rejection of any particular portion of a plaint.*

7) In Sejal Glass Ltd. vs. Navilan Merchants Pvt. Ltd. reported in AIR 2017 SC 4477, the Apex Court was pleased to hold that *it is settled-law that the plaint as a whole can be rejected under Order VII Rule 11.*

8) In Biswanath Banik and Anr. vs. Sulagna Bose and Ors. reported in 2022 SCC OnLine SC 314, the Supreme Court was pleased to hold that *while considering an application under Order VII Rule 11 CPC, the Court has to go through the entire plaint averments and can not reject the plaint by reading only few lines/ passages and ignoring the other relevant parts of the plaint.*

Plaint case is that Late Mohanlal Goenka was the founder of Goenka family. He had three sons, namely, Sawarmal, Atmaram and Chandra Prakash and had six daughters. Sawarmal died on 01.02.1996 leaving behind his widow and three children, namely, Rajesh, Suman and Nilanjana. Said Rajesh got married with one Aruna Goenka who gave birth of a male child, herein the plaintiff.

Marriage of Rajesh and Aruna was dissolved by a decree of divorce. Then Rajesh got married with Deepa Goenka and in their marriage one son, namely, Devansh was born. That 'A' schedule property was taken on lease in the name of Anandi Devi Goenka, w/o. Late Mohanlal Goenka in the year 1972 for a period of 70 years. That property has been used as the residence of Goenka family. Sawarmal Goenka had managed to get back the possession of the occupied portions of 'A' schedule property from the hands of the tenants. In 1970s, Atmaram and Chandra Prakash Goenka left the family residence and started living elsewhere. Only Sawarmal Goenka continued to reside therein. That Anandi Devi Goenka died testate leaving a Will dated 13.02.1979. Probate was granted on the Will on 16.08.1980. As per wishes of Late Anandi Devi Goenka, 'Sawarmal Goenka HUF' was inducted as a monthly tenant in 'A' schedule property by a tenancy agreement dated 25.03.1989. That property has been given on rent for marriage and other ceremonies, by Sawarmal Goenka HUF for earnings. Around August, 2018 a property broker made a contact with the plaintiff to ensure whether the plaintiff would be willing to sale his share in the suit property. Plaintiff was utterly surprised by that proposal. Probate of the will is challenged in the High Court. Defendant No.1 and 2 have engineered a fraud using which defendant No.2 is claiming herself as the sole owner of 'A' schedule property. Defendant No.2 has no independent income source, being a house wife. That defendant No.1 gave the consideration money from the corpus of HUF for purchasing 'A' schedule property in the name of defendant No.2. That the plaintiff has 1/7th share in the undivided property of Goenka joint family. That the plaintiff demanded partition of the joint family property by a letter through his Advocate on 25.08.2018 but amicable partition was denied by the defendants.

Plaint shows that primarily this is a suit for declaration of title of 'Sawarmal Goenka HUF' in respect of 'A' schedule property,

Secondly for partition of the properties of Goenka joint family; in alternative to prayer No. (a) and (b) for a declaration of tenancy right of 'Sawarmal Goenka HUF' in respect of 'A' schedule property and perpetual injunction, and thirdly for accounts.

Plaintiff in his plaint annexed the alleged Will executed by his great grand-mother Late Anandi Devi Goenka. Ld. Advocate for the plaintiff argued that one appeal is pending against the grant of probate of the Will. It is admitted position that the Will of Late Anandi Devi has been probated under law, so, until that probate will be turned down by the appellate Court, no right, title and interest in the assets of Late Anandi Devi will be devolved upon the plaintiff. Till then plaintiff does not have any right to sue for partition of the assets mentioned in the Will.

Plaintiff further argued that Atmaram Goenka being an executor of the Will of Late Anandi Devi, had no right to surrender the lease in respect of 'A' schedule property.

Annexed copy of the Will of Late Anandi Devi speaks that '27, Ballygunge Park Road' and other properties, if any to be found out in her name, would vest in her executors for administration and distribution of assets. The term 'administration' has its wider application. It is upon the executor of the Will how he manages the assets for proper administration. In paragraph-'J' of the Deed of Surrender dated 27.06.2018 it is specifically averted by the sole surviving executor that he does not wish to continue with the lease any longer due to various difficulties. Plaintiff, in his pleadings, though questioned the alleged surrender of lease but no relief is claimed against said surrender of lease.

It is further argued by Ld. Advocate for the plaintiff that 'A' schedule property was purchased by defendant No.2 from the wealth of 'Sawarmal Goenka HUF'. Though, the plaintiff perpetrates the ingredients of fraud but no relief is claimed to that effect. Plaintiff shows that the plaintiff left the alleged Deed of Conveyance

unturned as no relief is claimed in respect of the alleged Deed. From the Deed of Conveyance being registration No.4895 of 2011 executed by Asish Kumar Law, erstwhile owner of 'A' schedule property, in favour of Smt. Deepa Goenka, defendant No.2 herein, it is appeared that defendant No.2 is the absolute owner of the property. So without making any declaration regarding the alleged Deed of Conveyance, how the absolute right of the plaintiff in respect of 'A' schedule property can be made. As such, I have no hesitation to hold that the plaintiff has no cause of action to bring this suit for a decree of declaration in respect of schedule "A" property.

Plaintiff in the suit prays for partition of 'A' schedule property of which defendant No.2 became the absolute owner in the year 2011; and the lease was surrendered to defendant Nio2 in the year 2018. Thus right to claim partition by the plaintiff in respect of 'A' schedule property, is not apparent in the plaint.

Moreover, the reliefs claimed and the schedule 'A' of the plaint does not reflect the intention of the plaintiff to get the partition of the lease-hold right but it seems to be a partition of the property itself which is legally owned by other. The prayer for partition is inconsistent with the contention of the plaint.

Further, plaintiff makes a claim over jewellery and ornaments owned by Goenka family as mentioned in 'B' schedule of the plaint. But the plaint does not disclose the name of the person(s) who actually owned and possessed those jewellery. Averments made in paragraph No.29 of the plaint is evident that the list of mentioned ornaments is hypothetical without any basis, devoid of getting relief on that.

Moreover, Goenka family starts from Late Mohanlal Goenka but the plaint is silent on the assets left by Late Mohanlal. Plaint discloses that primarily Late Anandi Devi was the lease-holder in respect of 'A' schedule property. But plaint does not disclose

anything about the 'Haveli' as mentioned in 'B' schedule on the plaint. In prayer No.(b) of the plaint, plaintiff prays for partition of the assets and properties of Goenka joint family. Plaint reveals (paragraph No.1) that Late Anandi Devi had three sons and six daughters from her husband, but the plaintiff does not bother to make all of them party in a suit for partition of the properties alleged owned by Goenka joint family. Now, the question is that which property is to be considered as the joint property of Goenka family and who are considered to be the co-sharers (I consciously do not use the term 'coparcener'). Genealogical table annexed with the plaint, is incomplete as regards to Goenka joint family.

Regarding tenancy of 'Sawarmal Goenka HUF' in respect of schedule 'A' property, apart from tenancy agreement dated 25.03.1989 I would like to rely on averments made in paragraph No.'D' in the Deed of Surrender wherein the tenancy and possession of 'Sawarmal Goenka HUF' in respect of schedule 'A' property, is admitted by the executor of the Will. So, there is no doubt that 'Sawarmal Goenka HUF' has a right in respect of schedule 'A' property as a tenant, but the plaint does not implead 'Sawarmal Goenka HUF' as a plaintiff in the suit for getting a decree in its favour. In absence of 'Sawarmal Goenka HUF' no declaration of tenancy in respect of schedule 'A' property can be made in the suit.

It is correctly argued from defendant side that the immovable property mentioned in schedule 'B' of the plaint has no specific description which renders the suit bad under purview of Order 7 Rule 3 of the Code of Civil Procedure.

Plaintiff in the instant suit takes two-fold stand- firstly, seeking partition of the suit property allegedly inherited; secondly, claiming right as a tenant in the suit property. Plaintiff can not sail in two boats at the same time. Both the stands taken in the plaint, are inconsistent to each other.

Further, the plaint does not disclose any tangible incident

where from it can be ascertained that his tenancy right has ever been threatened by the landlord(s). Section 34 of the Specific Relief Act depicts that under this section declaration of any right can only be sought for if existence of that right/interest has been denied or threatened by the defendant(s). In four corner of the plaint no apparent threat on the alleged tenancy right is found. Thus, I have no hesitation to hold that section 34 of the Specific Relief Act is not at all attracted in the suit, and the plaintiff has no cause of action to bring this suit for declaration of his tenancy right.

In the premise of above discussion I am to hold that the plaintiff is not sure about his own right in respect of the suit properties. The plaint is a clear eye-wash and is drafted so cleverly only to create an illusion regarding cause of action. Plaint has failed to substantiate the right of the plaintiff to sue the defendants in respect of the suit properties.

Thus, I am to hold that plaintiff has no cause of action to bring the suit against the defendants.

Petition under Order 7 Rule 11 of the Code of Civil Procedure filed by defendant No.2, is hereby allowed on contest.

Hence, it is

ordered

that the plaint be and the same is rejected under Order 7 Rule 11 of the Code of Civil Procedure but without any order as to costs.

Dealing Assistant is directed to draw up decree accordingly.

Suit is thus, disposed off accordingly.

Dealing Assistant is directed to note in relevant registers.

Dictated & Corrected by me.

Sd/- (Sanjib Roy)
Civil Judge (Sr. Divn.)
2nd Court, Alipore

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